Supreme Court, U.S.
FILED
APR 14 2003

No. 02-1351

IN THE

Supreme Court of the United States

LNC INVESTMENTS, INC. and
CHARTER NATIONAL LIFE INSURANCE COMPANY,

Petitioners,

v.

FLEET NATIONAL BANK and
WACHOVIA BANK, N.A.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT WACHOVIA BANK, N.A.

RICHARD W. HILL
Counsel of Record
JOSEPH T. BOCCASSINI
MCCARTER & ENGLISH, LLP
100 Mulberry Street
Four Gateway Center
Newark, New Jersey 07102
(973) 622-4444

Attorneys for Respondent
Wachovia Bank, N.A.

180262

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

COUNTER-STATEMENT OF THE QUESTION PRESENTED

Should the United States Supreme Court review a determination by the Court of Appeals affirming a jury verdict, at the conclusion of a second trial, where the Court of Appeals has not construed any federal statute and whose ruling is not contrary to any decision of this Court or any Circuit Court.

STATEMENT PURSUANT TO RULE 29.6

Defendant-Appellee First Fidelity Bank, N.A., New Jersey, whose name was changed to First Union National Bank as of January 1, 1996, was a wholly-owned subsidiary of First Union Corporation, a public company whose common stock was traded on the New York Stock Exchange. On September 1, 2001, Wachovia Corporation merged with and into First Union Corporation and the surviving entity was named Wachovia Corporation. On April 1, 2002, Wachovia Bank, N.A. merged with and into First Union National Bank and the surviving entity was named Wachovia Bank, N.A., a wholly-owned subsidiary of Wachovia Corporation, a public company whose common stock is traded on the New York Stock Exchange.

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Respondent, Wachovia Bank, N.A. (formerly known as First Fidelity Bank, N.A.), respectfully submits the following brief in opposition to Petitioners' Petition for Writ of Certiorari.

COUNTER-STATEMENT OF THE CASE

During the course of the bankruptcy of Eastern Air Lines, Inc. ("Eastern"), LNC Investments, Inc. and Charter National Life Insurance Company ("Petitioners"), purchased, on the open market, bonds issued by an Equipment Trust (the "Trust") and secured by airplanes ("Collateral Aircraft") utilized by Eastern. First Fidelity Bank, N.A. New Jersey (n/k/a Wachovia Bank, N.A.), National Westminster Bank, N.J., and United Jersey Bank (collectively, the "Respondents") were trustees of the Trust.

Petitioners alleged that they were damaged by the Respondents' failure to act prudently to protect the value of the Collateral Aircraft during the Eastern Bankruptcy.

This matter has been tried twice to a jury. In each trial the jury was asked to determine: (i) whether the Respondents acted prudently; and (ii) if imprudent, whether the imprudence caused Petitioners' injury. In the first trial, the jury found for the Respondents, determining that although Respondents acted imprudently, their imprudence did not cause any loss to the Petitioners. Petitioners appealed the Judgment of Dismissal to the United States Court of Appeals for the Second Circuit (the "Second Circuit"), which reversed and remanded for a new trial. *LNC Investments, Inc. v. First Fidelity Bank, N.A. New Jersey*, 173 F.3d 454 (2d Cir. 1999) ("*LNC I*")

At the second trial, the jury concluded that the Respondents acted prudently and never reached the issue of causation. Another appeal to the Second Circuit followed and the Judgment of Dismissal was affirmed by the Second Circuit on October 17, 2002. *LNC Investments, Inc. v. National Westminster Bank, N.J., et al.*, 308 F.3d 169 (2d Cir. 2002) ("*LNC II*"). A petition for both panel rehearing and *en banc* rehearing was denied. Petitioners seek review of this affirmance.

In the underlying dispute, Petitioners alleged that Respondents should have filed, at an earlier date, a motion for relief from stay or for the provision of adequate protection under either § 362 or § 363 of Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code"). *See* 11 U.S.C.A. §§ 362 and 363. Petitioners argued that Respondents should have filed such a motion at an earlier time because they would have been entitled to a "superpriority" administrative claim under § 507(b) of the Bankruptcy Code for the decreased value of the Collateral Aircraft, even if the motion were denied (the "§ 507(b) Issue"). Respondents disagreed.

Because the District Court did not decide the § 507(b) Issue in the first trial, in *LNC I*, the Second Circuit reversed and remanded the matter concluding that ". . . the district court should . . . decide the [507(b)] issue and determine what type of charge on superpriority **and causation** is appropriate . . ." *LNC I*, 308 F.3d at 468 (emphasis added).

In the second trial, the District Court did decide the § 507(b) Issue. In *LNC II*, the Second Circuit concluded again that the District Court's decision with respect to § 507(b) was relevant only to the jury's deliberation on causation (reaffirming what it stated in its first opinion). *See LNC II*,

308 F.3d at 175 ("[o]ur direction to the district court to determine the superpriority question as a legal matter went solely to the issue of causation"). Since, in the second trial, the jury found for the Respondents on the issue of prudence (never reaching the causation question), and since the § 507(b) Issue applied only to causation, the Second Circuit saw no need to review the District Court's decision on the § 507(b) Issue. *See id.* at 176-77.

This case has been considered by multiple judges on multiple occasions and Petitioners have not prevailed. The decision from which Petitioners seek review does not involve construction of a Federal statute, is not at variance with a decision of another Circuit, and is not at variance with any decision of this Court. The Second Circuit reviewed the facts and record of this case, and found that there was no basis for a third trial.

This Court's exercise of its supervisory power is unnecessary.

THE PETITION FOR WRIT SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS, NO DECISION ON AN IMPORTANT FEDERAL QUESTION, AND NO MISCARRIAGE OF JUSTICE

Petitioners do not attempt to argue that a conflict exists among the Courts of Appeals, that the Second Circuit decided an important federal question or, for that matter, that the Second Circuit decided *any* federal question. Petitioners' plea for review is based solely on the argument that the Second Circuit ". . . departed from the accepted and usual course of judicial proceedings . . ." (*Petitioners' Brief* at 10) by

rendering a decision, and disposing of the case, on grounds other than the § 507(b) Issue.

Petitioners fail to clearly articulate the "accepted and usual course of judicial proceedings" from which the Second Circuit allegedly departed. However, the Petition suggests that the "accepted and usual course of judicial proceedings" requires that all issues raised before a circuit court must be decided. This is simply incorrect.

It is common for circuit courts to refrain from addressing all issues raised if the appeal can be decided on independently sufficient grounds.[1] In the instant case, the Second Circuit

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1. *See McDonough v. Royal Caribbean Cruises, Ltd.*, 66 F.3d 150 (7th Cir. 1995). *McDonough* states:

> If the district court's reasoning fails, but another rationale supports the judgment in light of the facts of the case, an appellate court may affirm on the alternate ground [citation omitted], but if the district court's reasoning is sound and has sufficient evidentiary support, the appellate court need not consider the issues on which the district court's holding did not rest

Id. at 151. *See also Karsten v. Kaiser Foundation Health Plan of the Mid-Atlantic States, Inc.*, 36 F.3d 8 (4th Cir. 1994). *Karsten* states:

> alternative holdings also provide courts, particularly appellate courts reviewing alternative holdings below, with the tempting opportunity to stray into the practice of advisory opinion-making, solving questions that do not actually require answering in order to resolve the matters before them. If the first reason given is

(Cont'd)

was able to decide the case by reviewing the jury charge on prudence, which was the only issue decided by the second jury. As the § 507(b) Issue was irrelevant to the jury charge on prudence (and Petitioners waived appeal on the separate issue of whether the prudence charge should include an instruction that the law as to the § 507(b) Issue was unsettled at the time of the Eastern bankruptcy) the Second Circuit did not need to address the § 507(b) Issue in order to render a decision. As stated by the Second Circuit, ". . . because prudence is the sole issue on which the jury decided the case, and the correct interpretation of the [Bankruptcy] Code is irrelevant to the issue of prudence, we would not need to address the parties' contentions regarding the [Bankruptcy] Code in any case. . . ." *LNC II*, 308 F.3d at 177.

Because the Second Circuit did not decide the § 507(b) Issue, this Court should not grant a writ of certiorari to review this issue. *See National Collegiate Athletic Assoc. v. R.M. Smith*, 525 U.S. 459, 470 (1999) (citing *Roberts v. Galen of Va., Inc.*, 525 U.S. 249, 253-54 (1999) and *United States v. Best Foods*, 524 U.S. 51, 72-73 (1998)) (reiterating the Supreme Court's rule that "we do not decide in the first instance issues not decided below").

(Cont'd)

> independently sufficient, then all those that follow are surplusage; thus, the strength of the first makes all the rest *dicta*.

Id. at 11. *See also Phillips Petroleum Co. v. Lujan*, 4 F.3d 858, 864 (10th Cir. 1993) ("As [appellee's] issue is not necessary for appeal, we decline to address it"); *Putnam Resources v. Pateman*, 958 F.2d 448, 458 (1st Cir. 1992) ("if determination of an issue effectively disposes of an appeal, the appellate court should resolve the case on that basis without reaching other presented issues [citations omitted]").

Based on the foregoing, Petitioners' argument that this Court should exercise its supervisory power over the Second Circuit's decision is misplaced. Indeed, the cases relied upon by Petitioners are distinguishable from the present case.[2]

At its core, Petitioners seek review or summary reversal of a Second Circuit decision involving facts and principles important only to the parties, having no importance to the public, and not involving any miscarriage of justice. After two trials and two appeals, Petitioners have been afforded ample justice and due process. The Petition is merely an attempt to give life to Petitioners' dead arguments.

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2. *See Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 344-45 (1976). *Thermtron Products* stands for the proposition that congestion in the court system will not warrant remanding cases. As this proposition does not apply to the instant case, it is unclear why Petitioners cite it. *See also Southwestern Sugar & Molasses v. River Terminals Corp.*, 360 U.S. 411, 414 (1959) (the Supreme Court held that the Court of Appeals should not have deferred on an issue solely because there was a pending administrative proceeding). This is inapplicable to the instant case. *See also Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (stating that it is the task of the Court of Appeals to "decide all properly presented **cases** coming before it" as opposed to all issues presented in a single case) (emphasis added).

PETITIONERS' ATTEMPT TO MANUFACTURE CONFLICT BETWEEN THE TWO OPINIONS OF THE SECOND CIRCUIT IS MERITLESS

Petitioners have premised their entire argument on the suggestion that there is a conflict between the *LNC I* and *LNC II* decisions. No such conflict exists.[3] In 1999, following a jury verdict in Respondents' favor, the Second Circuit remanded the case and directed the District Court to decide the § 507(b) Issue and instruct the jury on the relevant law for its deliberations **on causation**. *See LNC I*, 173 F.3d at 468. *See also LNC II*, 308 F.3d 175.

In 2002, after the second jury trial, the Second Circuit reaffirmed the plain meaning of its decision in *LNC I* that the law with regard to the § 507(b) Issue was only relevant to causation and not to prudence. *See LNC II*, 308 F.3d at 173. As the second jury found that the Respondents were not imprudent, and thus did not reach the issue of causation, the District Court's instruction on the law regarding § 507(b) was irrelevant.

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3. In addition to Petitioners' manufactured conflict between the *LNC I* and *LNC II* decisions, Petitioners also misstate the record by incorrectly suggesting that the two trials were identical in all respects other than a dichotomy in the rulings of the two District Court Judges on the § 507(b) Issue. In fact, there were many differences between the first and second trials, including the witnesses who were called, the evidentiary rulings, the documents admitted into evidence and the arguments made to the jury. Further, Petitioners' alleged dichotomy between the two District Court Judges on the § 507(b) Issue does not exist. In the final analysis, the District Court Judge in the first trial never reached any firm conclusion on the § 507(b) Issue. *See* Appendix C n. 4 at p. 39a-41a.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

RICHARD W. HILL
Counsel of Record
JOSEPH T. BOCCASSINI
McCARTER & ENGLISH, LLP
100 Mulberry Street
Four Gateway Center
Newark, New Jersey 07102
(973) 622-4444

Attorneys for Respondent
Wachovia Bank, N.A.